IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
vs.	)	No. 10-cr-634-2
	)	
ARLENE HERNANDEZ-PEREZ,	)	
	)	
Defendant	)	

* * *

APPEARANCES:

THOMAS M. ZALESKI, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

BENJAMIN B. COOPER, ESQUIRE
Assistant Federal Defender
On behalf of Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

The matter before the court is the objection of defendant Arlene Hernandez-Perez to paragraph 64 of her March 1, 2011 Presentence Investigation Report, which applies five-year mandatory minimum terms of imprisonment to two of the drug offenses for which defendant is to be sentenced, pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).[1] As relevant to this objection, defendant pled guilty to one count of Conspiracy to

[1] The objection was made in Defendant's Sentencing Memorandum - Filed Under Seal, which memorandum was filed April 21, 2011 (Document 85).

distribute five grams or more of cocaine base ("crack") in violation of 21 U.S.C. § 846, and one count of Possession with intent to distribute five grams or more of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1). These counts arise from defendant's possession of 7.7 grams of cocaine base.[2]

Defendant contends that The Fair Sentencing Act of 2010, Pub.L. No. 111-120, 124 Stat. 2372 (2010)("FSA"), should be applied retroactively to her sentencing, although she committed these offenses before the August 3, 2010 enactment of the FSA, to the effect that these mandatory minimums would not apply. The FSA amended 21 U.S.C. § 841(b)(1)(B)(iii) to raise the amount of cocaine base necessary to trigger a mandatory five-year minimum term of imprisonment from five grams to twenty-eight grams. Under the pre-FSA version of § 841(b)(1)(B)(iii), 7.7 grams triggers the mandatory minimum. Under the statute as amended by the FSA, it does not.

On April 8, 2011, I conducted a sentencing hearing and heard argument on this objection. At the close of the hearing, I ordered supplemental briefing and took the matter under advisement. I have considered the Government's Supplemental Sentencing Memorandum filed April 12, 2011 and Defendant's Supplemental Sentencing Memorandum filed April 15, 2011.

For the reasons articulated below, I now conclude that Fair Sentencing Act does not apply retroactively to offenses

[2] The parties stipulated that defendant possessed this amount of cocaine base on page 9, paragraph 8(b) of the Guilty Plea Agreement.

committed before the enactment of that law on August 3, 2010, even where the defendant has not yet been sentenced. For crimes committed earlier, such as defendant's, the mandatory penalties set forth in the pre-FSA version of 21 U.S.C. § 841(b)(1)(B)(iii) continue to apply under the "general saving statute", 1 U.S.C. § 109. Accordingly, I overrule defendant's objection.

PROCEDURAL HISTORY

On September 7, 2010, a Criminal Complaint was filed against defendant Arlene Hernandez-Perez and her co-defendant Alberto Leon. On September 10, 2010, defendant Hernandez-Perez made her initial appearance before United States Magistrate Judge Jacob P. Hart.

On September 28, 2010, a seven-count Indictment was filed against both defendants Hernandez-Perez and Leon. The Indictment charged both co-defendants with one count of Conspiracy to distribute five grams or more of cocaine base ("crack") in violation of 21 U.S.C. § 846 (Count One); three counts of Distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Counts Two, Three and Four); one count of Possession with intent to distribute five or more grams of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Five); one count of Possession of firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)

(Count Six); and aiding and abetting in violation of 18 U.S.C. § 2.[3]

On October 6, 2010, defendant Hernandez-Perez was arraigned before United States Magistrate Judge Henry S. Perkin. On January 5, 2011, defendant Hernandez-Perez entered a guilty plea to Counts One through Six of the Indictment, pursuant to a plea agreement. Defendant appeared before me for sentencing on April 8, 2011. At that time, I heard argument on defendant's objection to application of the five-year mandatory minimum terms of imprisonment pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and took the objection under advisement. Hence this Opinion.

CONTENTIONS

Defendant's Contentions

Defendant Hernandez-Perez contends that the FSA should be applied retroactively to her sentencing, to the effect that the five-year mandatory minimum term of imprisonment pursuant to § 841(b)(1)(B)(iii) would not apply. Application of the FSA here would result in a reduction of the applicable sentencing guidelines from 120 months to 78-84 months of imprisonment.[4]

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[3] Count Seven of the Indictment charged defendant Leon only with one count of Convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

[4] Defendant Hernandez-Perez's Presentence Investigation Report assigns defendant a Base Offense Level of 18 (paragraph 27). Defendant received a two-level downward Adjustment for Acceptance of Responsibility

(Footnote 4 continued):

Defendant contends that the fair implication of the FSA is that its new higher threshold for the amount of cocaine base that triggers the five-year mandatory minimum should apply to all sentencings that take place after the August 3, 2010 enactment of the FSA, regardless of when the offense conduct occurred.

Defendant further contends that the decision of the United States Court of Appeals for the Third Circuit in United States v. Reevey, 631 F.3d 110, 114-115 (3d Cir. 2010), in which the court held that the FSA is not retroactively applicable to offenses committed before the August 3, 2010 enactment date, is distinguishable. Specifically, unlike defendant Hernandez-Perez, the defendants in Reevey had already been sentenced when the FSA was enacted. Id. at 113-114.

(Continuation of footnote 4):

(paragraph 34) and a one-level downward Additional Adjustment for Acceptance of Responsibility (paragraph 35), resulting in a Total Offense Level of 15 (paragraph 38).

In addition, paragraph 41 of the Presentence Investigation Report notes that defendant has zero criminal history points, resulting in a criminal history category of I. A Total Offense Level of 15 and a criminal history category of I yields a guideline sentence range of 18 to 24 months.

However, as noted in paragraph 64, a five-year mandatory minimum term of imprisonment applies for Counts One and Five, pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). This mandatory minimum applies because defendant possessed 7.7 grams of cocaine base, and causes the guideline range to become 60 months. In addition, a five-year consecutive mandatory minimum term of imprisonment applies for Count Six pursuant to 18 U.S.C. § 924(c)(1), in connection with the offense of Possession of a firearm in furtherance of a drug trafficking crime. Because this five-year term must run consecutively to any other sentence imposed, the resulting guideline range for imprisonment is 120 months (paragraph 65).

If the FSA were applied to defendant's sentence, she would no longer be subject to the five-year mandatory minimum required by 21 U.S.C. § 841(b)(1)(B)(iii), because the FSA raised the triggering amount of cocaine base from 5 grams to 28 grams. Therefore, her guideline range for imprisonment would be reduced to 78 to 84 months (representing the original range of 18 to 24 months, plus the mandatory consecutive five years (or 60 months) required by 18 U.S.C. § 924(c)(1)).

Defendant contends that four factors indicate that where sentencing occurs after the August 3, 2010 FSA enactment date, the FSA should be applied retroactively.

First, the FSA contains no provision setting forth an effective date, and thus the FSA took effect immediately upon signing by the President on August 3, 2010. See Hays and Company v. Merrill Lynch, 885 F.2d 1149, 1151 n.1 (3d Cir. 1989). Second, the FSA contains no saving clause specifying whether penalties repealed by the FSA are still to be imposed after the FSA's effective date to punish pre-August 3, 2010 conduct. Third, Section 8 of the FSA gives the United States Sentencing Commission emergency authority to amend the Sentencing Guidelines "as soon as practicable, and in any event [within] 90 days after the date of enactment" to make the guidelines consistent with the FSA. Pub. L. No. 111-120, 124 Stat. 2372, 2374 (2010). Fourth, Section 10 of the FSA directs the Sentencing Commission to submit a report to Congress within five years detailing the "impact of the changes in Federal sentencing law under [the FSA]." Id. at 2375.

Defendant contends that these four factors, especially the third and fourth factors, indicate that the fair implication of the FSA is that it applies to all defendants sentenced after August 3, 2010. Therefore, defendant contends that the general saving statute, 1 U.S.C. § 109, does not preserve the pre-FSA mandatory-minimum penalties because this statute does not apply

when a repealing statute provides for a different result, either expressly or by fair implication. Defendant relies on Great Northern Railway Company v. United States, 208 U.S. 452, 465, 28 S.Ct. 313, 316, 52 L.Ed. 567 (1908), and Warden v. Marrero, 417 U.S. 653, 659 n.10, 94 S.Ct. 2532, 2536 n.10, 41 L.Ed.2d 383, 390 n.10 (1974), in support of this argument.

Therefore, defendant Hernandez-Perez contends that the FSA should be applied retroactively to her sentencing to eliminate the five-year mandatory minimum term of imprisonment, resulting in a reduction of her guideline range from 120 months to 78-84 months.

Government's Contentions

The government contends that the FSA should not apply to defendant Hernandez-Perez's sentencing for offenses she committed before the August 3, 2010 FSA enactment date, even though she will be sentenced after this date.

Relying on Marrero, as well as on two Third Circuit decisions, United States v. Jacobs, 919 F.2d 10, 11-13 (3d Cir. 1990) and United States v. Caldwell, 463 F.2d 590, 591, 594 (3d Cir. 1972), the government contends that because the FSA does not contain an express contrary provision that repeals the previous mandatory-minimum provisions, the saving statute requires this court to apply the statutory law in force in January and February of 2010, the time that defendant committed her offenses.

The government agrees with defendant that the Third Circuit's decision in Reevey is distinguishable from defendant's case because unlike defendant Hernandez-Perez, the Reevey defendants had already been sentenced when the FSA was enacted. However, the government contends that the analysis in Reevey suggests that the Third Circuit will also reject retroactivity for defendants who have yet to be sentenced. Specifically, the government asserts that in Reevey and other precedent cited in Reevey, the Third Circuit focuses on the date of the commission of the offense when discussing retroactivity.

The government additionally contends that defendant's "fair implication" argument misreads Marrero and Great Northern Railway, and rejects application of the explicit language of the saving statute. Specifically, the government argues that these Supreme Court decisions address a distinguishable situation where Congress actually addresses the issue of retroactivity in the repealing law, and the court must determine whether that part of the repealing law overrides or displaces the general saving statute.

Therefore, the government contends that because Congress did not address retroactivity in the FSA, the general saving statute requires that the pre-FSA mandatory-minimum provisions must apply to defendant's sentence for offenses committed before August 3, 2010, even though she will be sentenced after enactment of the FSA.

For the following reasons, I agree with the government. I conclude that the Fair Sentencing Act does not apply retroactively to offenses committed before the enactment of that law on August 3, 2010, even where the defendant has not yet been sentenced. For crimes committed earlier, such as defendant's, the mandatory penalties set forth in the pre-FSA version of 21 U.S.C. § 841(b)(1)(B)(iii) continue to apply under the general saving statute. Therefore, defendant Hernandez-Perez's guideline range remains 120 months.

DISCUSSION

The FSA was enacted on August 3, 2010, when United States President Barack Obama signed the act into law. Because the FSA contains no provision setting forth an effective date, the act became effective immediately upon signing. See Hays and Company v. Merrill Lynch, 885 F.2d 1149, 1151 n.1 (3d Cir. 1989). The FSA reduces penalties for crack cocaine offenses. As relevant to this sentencing, the FSA amended 21 U.S.C. § 841(b)(1)(B)(iii) by raising the amount of cocaine base, or "crack", necessary to trigger a mandatory five-year term of imprisonment from five grams to twenty-eight grams.

The preamble to the FSA indicates that its purpose was to reduce the sentencing disparity between powder- and crack-cocaine offenses in order to "restore fairness to Federal cocaine sentencing." Pub. L. No. 111-120, 124 Stat. 2372, 2372 (2010).

Section 8 of the FSA gives the United States Sentencing Commission emergency authority to amend the Sentencing Guidelines "as soon as practicable, and in any event [within] 90 days after the date of enactment" to make the guidelines consistent with the FSA. 124 Stat. at 2374. The relevant amendments to the guidelines became effective on November 1, 2010. Section 10 of the FSA directs the Sentencing Commission to submit a report to Congress within five years detailing the "impact of the changes in Federal sentencing law under [the FSA]." 124 Stat. at 2375.

However, the FSA contains no "saving clause" or other provision specifying whether the penalty provisions amended by the FSA are still to be applied to defendants who committed their offenses prior to August 3, 2010.

In United States v. Reevey, 631 F.3d 110 (3d Cir. 2010), the United States Court of Appeals for the Third Circuit held that the FSA does not apply retroactively to offenses committed before August 3, 2010 where the defendant was already sentenced before that date. Reevey, 631 F.3d at 114-115. For crimes committed before August 3, 2010, the mandatory penalties set forth in the pre-FSA version of 21 U.S.C. § 841(b)(1) continued to apply under the general saving statute", 1 U.S.C. § 109. Id.

The saving statute provides, in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so

> expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

The saving statute "bar[s] application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense." Warden v. Marrero, 417 U.S. 653, 661, 94 S.Ct. 2532, 2537, 41 L.Ed.2d 383, 391 (1974). See also United States v. Jacobs, 919 F.2d 10, 11-13 (3d Cir. 1990). Instead, courts must apply the statutory law in force at the time of the commission of the offense. See Marrero, 417 U.S. at 661, 94 S.Ct. at 2537, 41 L.Ed.2d at 391; Jacobs, 919 F.2d at 12.

In applying 1 U.S.C. § 109, the Reevey court held:

> The general Savings Statute requires that any intent to "release or extinguish any penalty" under an existing statute be "expressly provide[d]" in the subsequent congressional enactment. The FSA does not contain an express statement that the increase in the amount of crack cocaine triggering the five-year mandatory minimum is to be applied to crimes committed before the FSA's effective date. Nor does it provide that those sentenced before the FSA's effective date are to be re-sentenced. Therefore, the FSA cannot be applied to [the defendants].

Reevey, 631 F.3d at 114-115 (quoting 1 U.S.C. § 109).

The Third Circuit earlier held that where Congress repeals a drug law requiring mandatory minimum sentences, but does not expressly make that change retroactive, the mandatory minimum sentence continues to apply to defendants who committed the crime while the prior law was in force, even if that law is

repealed before the defendants are indicted. See United States v. Caldwell, 463 F.2d 590, 591, 594 (3d Cir. 1972), in which the court stated: "[T]he provisions of 1 U.S.C. § 109 have the effect of preserving the penalties prescribed by [the prior drug statute], since Congress did not otherwise provide."

The Caldwell court recognized that its holding could result in two defendants "receiv[ing] different penalties for having committed essentially the same crimes - although at different times." Caldwell, 463 F.2d at 594. However, the court concluded:

> Such a result may be considered anomalous, but **it is Congress that has drawn the line.** If penalties are to differ because of an arbitrarily selected date, it seems fairer that the severity of the penalty depend upon the voluntary act of a defendant in choosing the date of his criminal conduct than upon the date of sentencing, which could vary with the fortuities of criminal proceedings.

Caldwell, 463 F.3d at 594 (emphasis added).

Regarding the role of Congress, the Supreme Court in Marrero similarly stated that an argument for the Court to make a new, more lenient drug statute retroactive "is addressed to the wrong governmental branch. Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds." Marrero, 417 U.S. at 664, 94 S.Ct. at 2538, 41 L.Ed.2d at 392-393.

The majority of other federal circuit courts of appeals are in agreement with the Third Circuit's holding in Reevey that

the FSA is not retroactively applicable where a defendant committed an offense and was already sentenced before the August 3, 2010 effective date.[5] However, Reevey did not address whether defendants whose offenses were committed before August 3, 2010, but who were *not* sentenced by that date, should benefit from the FSA's amendments to 21 U.S.C. § 841(b)(1). This issue is currently on appeal before the Third Circuit in United States v. Jackson, Appeal No. 10-4271.

This court is aware of only one federal circuit court of appeals decision addressing retroactivity in this context: the recent decision of the Seventh Circuit in United States v. Fisher, 635 F.3d 336 (7th Cir. 2011). In Fisher, one of the defendants was sentenced after the August 3, 2010 effective date of the FSA. 635 F.3d at 338. The court reaffirmed its previous holding in United States v. Bell, 624 F.3d 803, 814-815 (7th Cir. 2010), that the FSA does not apply retroactively. Fisher, 635 F.3d at 340.

The Fisher court additionally held that "the relevant date for a determination of retroactivity is the date of the

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[5] Seven circuits held in accord with Reevey in precedential opinions. See United States v. Doggins, 633 F.3d 379, 384 (5th Cir. 2011); United States v. Diaz, 627 F.3d 930, 931 (2d Cir. 2010); United States v. Carradine, 621 F.3d 575, 580 (6th Cir. 2010); United States v. Bell, 624 F.3d 803, 814-815 (7th Cir. 2010); United States v. Brewer, 624 F.3d 900, 909 n.7 (8th Cir. 2010); United States v. Lewis, 625 F.3d 1224, 1228 (10th Cir. 2010); United States v. Gomes, 621 F.3d 1343, 1346 (11th Cir. 2010).

Two additional circuits held similarly in non-precedential opinions. See United States v. Wilson, 2010 WL 4561381, *2 (4th Cir. 2010); United States v. Hall, 403 Fed.Appx. 214, 217 (9th Cir. 2010).

underlying criminal conduct, not the date of sentencing." Id. In its analysis, the court referenced the long-standing debate surrounding the crack cocaine sentencing scheme, saying:

> Given...[the] high-level congressional awareness of[] this issue, we hesitate to read in by implication anything not obvious in the text of the FSA. We believe that if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission. In other words, if Congress wanted retroactive application of the FSA, it would have said so.

Fisher, 635 F.3d at 339-340.

Outside of the Third Circuit, some federal district courts have held that the FSA does apply retroactively to defendants who are being sentenced after the August 3, 2010 effective date of the FSA for offenses committed before that date. See, e.g., United States v. Watts, ___ F.Supp.2d ___, 2011 WL 1282542, *17 (D.Mass. Apr. 5, 2011)(Ponsor, J.); United States v. Robinson, ___ F.Supp.2d ___, 2011 WL 379536, *6 (E.D.Tenn. Feb. 4, 2011)(Collier, C.J.); United States v. Douglas, 746 F.Supp.2d 220, 231 (D.Me. 2010)(Hornby, J.).

However, federal district courts within the Third Circuit have consistently declined to apply the FSA retroactively in this context, concluding instead that the saving statute requires preservation of the pre-FSA mandatory-minimum provisions for offenses committed before August 3, 2010. See, e.g., United

States v. Gadson, 2011 WL 542433, *3 (W.D.Pa. Feb. 8, 2011)(McVerry, J.); United States v. Dickey, ___ F.Supp.2d ___, 2011 WL 49585, *11 (W.D.Pa. Jan. 4, 2011)(Gibson, J.); United States v. Burgess, 2010 WL 5437265, *3 (W.D.Pa. Dec. 27, 2010)(McVerry, J.); United States v. Jesus-Nunez, 2010 WL 5422604, *2 (M.D.Pa. Dec. 27, 2010)(Rambo, J.).

Upon review of the relevant caselaw, I agree with the government that retroactive application of the FSA is not warranted. Because the FSA does not contain an express provision that repeals the previous mandatory-minimum provisions, the saving statute requires this court to apply the version of 21 U.S.C. § 841(b)(1)(B)(iii) in force at the time defendant committed her offenses. See Marrero, 417 U.S. at 661, 94 S.Ct. at 2537, 41 L.Ed.2d at 391; Jacobs, 919 F.2d at 11-12. Additionally, although the Third Circuit's holding in Reevey does not control here, I agree that Reevey suggests that the appropriate focus when considering retroactivity is the date of the offense, not the sentencing. See Reevey, 631 F.3d at 114-115.

Other Third Circuit caselaw, relied upon by the Reevey court, also counsels that where Congress does not expressly provide for retroactivity, the law in force at the time of the offense must be applied. See Jacobs, 919 F.2d at 13; Caldwell, 463 F.2d at 594. I agree with the reasoning in Caldwell that the

severity of the penalties applied here more appropriately "depend[s] upon the voluntary act of [the] defendant in choosing the date of [her] criminal conduct than upon the date of sentencing...." 463 F.2d at 594.

Additionally, I find persuasive the Seventh Circuit's recent decision in Fisher, where the court similarly concluded that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." 635 F.3d at 340. Like the Fisher court, absent a specific directive by Congress in the text of the FSA, I "hesitate to read in [retroactivity] by implication.... [I]f Congress wanted retroactive application of the FSA, it would have said so." Id. at 339-340.

My conclusion is consistent with other district court decisions within the Third Circuit. See, e.g., Dickey, 2011 WL 49585 at *11 ; Burgess, 2010 WL 5437265 at *3. In holding against retroactivity, the Burgess court noted that "congressional intent cannot be considered when a repealing or amending statute does not expressly provide for retroactive effect." 2010 WL 5437265 at *2 (citing Jacobs, 919 F.2d at 13). And as stated in Dickey, "It is not the role of the courts...to give effect to what we judges *think* Congress should have done. The courts only give effect to what Congress *actually did*." 2011 WL 49585 at *11 (emphasis in original).

As discussed above, defendant contends because the FSA gives the United States Sentencing Commission emergency authority to amend the Sentencing Guidelines and directs the Commission to submit a report to Congress on the impact of the FSA within five years, the fair implication of the FSA is that it applies to all defendants sentenced after August 3, 2010. Therefore, defendant contends that the general saving statute, 1 U.S.C. § 109, does not preserve the pre-FSA mandatory-minimum penalties because this statute does not apply when a repealing statute provides for a different result, either expressly or by fair implication. See Great Northern Railway, 208 U.S. at 465, 28 S.Ct. at 316; Marrero, 417 U.S. at 659 n.10, 94 S.Ct. at 2536 n.10, 41 L.Ed.2d at 390 n.10 (1974).

I agree with the government that defendant's "fair implication" argument misreads footnote 10 of Marrero and Great Northern Railway, and rejects application of the explicit language of the saving statute. The "fair implication" language relied on by defendant addresses a distinguishable situation where Congress actually addresses the issue of retroactivity in the repealing law, and the court must determine whether that part of the repealing law overrides or displaces the general saving statute.

Specifically, in Marrero, the Court, relying on Great Northern Railway, noted that the new statute at issue contained

its own specific "saving clause" and thus the inquiry was whether that clause "can be said by fair implication or expressly to conflict with" the general saving clause. 417 U.S. at 659 n.10, 94 S.Ct. at 2536 n.10, 41 L.Ed.2d at 390 n.10 (citing Great Northern Railway, 208 U.S. at 465-466, 28 S.Ct. at 316-317). Here, the FSA has no specific provision addressing retroactivity or the application of the act to defendants not yet sentenced on August 3, 2010.

Other district court decisions within the Third Circuit have similarly rejected defendant's "fair implication" analysis. See, e.g., Gadson, 2011 WL 542433 at *2-3; Dickey, 2011 WL 49585 at *6-8; Burgess, 2010 WL 5437265 at *2-3. The Seventh Circuit in Fisher also rejected the "fair implication" analysis, as well as any suggestion that the emergency authority given to the Sentencing Commission to amend the Sentencing Guidelines necessarily implies that Congress wanted the FSA to be applied retroactively. See Fisher, 635 F.3d at 339-340.

CONCLUSION

For the foregoing reasons, I conclude that the FSA may not be applied retroactively, and thus the pre-FSA version of 21 U.S.C. § 841(b)(1)(B)(iii) must be applied when sentencing defendant Hernandez-Perez for her drug offenses committed before the August 3, 2010 enactment of the FSA.

Accordingly, as outlined in paragraph 64 of the Presentence Investigation Report, defendant is subject to a five-year mandatory minimum term of imprisonment for Counts One and Five of the Indictment because she possessed 7.7 grams of cocaine base. This mandatory minimum causes her guideline range to become 60 months. When combined with the five-year mandatory minimum consecutive term of imprisonment for Count Six (Possession of a firearm in furtherance of a drug trafficking crime) required by 21 U.S.C. § 924(c)(1), defendant's final guideline range becomes 120 months.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
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	)	
ARLENE HERNANDEZ-PEREZ	)	
	)	
Defendant	)	

O R D E R

NOW, this 20th day of May, 2011, upon consideration of defendant Arlene Hernandez-Perez's written objection to paragraph 64 of the Presentence Investigation Report revised March 25, 2011 in this matter, which objection was made in Defendant's Sentencing Memorandum - Filed Under Seal, which memorandum was submitted April 1, 2011 and filed April 21, 2011; after oral argument held at the April 8, 2011 sentencing hearing; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's objection is overruled.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge